

NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN DIMMICK,

Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA,

Defendant.

No. C 04-4965 PJH

**ORDER GRANTING IN PART
AND DENYING IN PART
GOVERNMENT'S MOTION FOR
JUDGMENT ON THE PLEADINGS;
FURTHER INSTRUCTIONS RE:
C 04-4965 PJH**

KEVIN DIMMICK,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. C 05-0971 PJH

Before the court is the government's motion for judgment on the pleadings as to Plaintiff Kevin Dimmick's ("Dimmick") first amended complaint ("1AC"), as supplemented by plaintiff's more definite statement ("MDS"), and also for dismissal or amendment of the plaintiff's complaint pursuant to Federal Rule of Civil Procedure 10(b). These motions pertain to case number 05-971 PJH only. Having read the papers and carefully considered the relevant legal authority, the court GRANTS both motions in part and DENIES them in

1 part for the reasons that follow.

2 BACKGROUND

3 Dimmick is a disabled veteran with AIDS who sought to enroll in an
4 investigational drug study at the Veterans' Administration Medical Hospital of San
5 Francisco ("VA Hospital"). He claimed that the VA Hospital and other organizations
6 affiliated with the VA Hospital, including the Regents of the University of California ("the
7 Regents") and Northern California Institute for Research and Education ("NCIRE"),
8 conspired to deny him medical care and forced him to take medications which had
9 previously caused negative side effects. Dimmick also claimed that Dr. Lampiris of the VA
10 Hospital failed to obtain a proper informed consent from him, and that Dr. Marmar of the VA
11 Hospital defamed him to third parties by referring to him as mentally ill. Lampiris and
12 Marmar are both members of NCIRE's board of directors.

13 Dimmick sued the Regents and private companies NCIRE, Boehringer-Ingelheim
14 ("BI"), and Abbott Laboratories ("Abbott") in the C 04-4965 PJH action, and the government
15 in the C 05-0971 PJH action. These two cases have had a complex procedural history.
16 Dimmick originally filed one consolidated case in San Francisco Superior Court against all
17 these parties and various federal employees of the VA Hospital. The government removed
18 the case entitled *Dimmick v. Volberding*, C 04-1480 PJH, to federal court. This court then
19 dismissed the federal defendants in case number C 04-1480 PJH, because Dimmick had
20 not exhausted his administrative remedies against them, and remanded the remaining
21 claims against the non-federal defendants to state court.

22 Dimmick then filed a second amended complaint in state court, which did not
23 explicitly name any federal employees but which contained claims against private parties
24 for the actions of VA employees. The government then removed the case a second time,
25 at which point it became *Dimmick v. NCIRE*, C 04-4965 PJH. Dimmick moved to remand
26 the case, but at the hearing on the motion, he withdrew his motion to remand and agreed to
27 proceed on those claims in federal court.

1 Dimmick then filed a third amended complaint ("3AC") in C 04-4965 PJH and, after
2 exhausting administrative remedies as required by the Federal Tort Claims Act ("FTCA"),
3 filed a third lawsuit, this time against the government, *Dimmick v. U.S.*, C 05-0971 PJH.
4 The two cases have been related but not consolidated on this court's docket.

5 All parties moved to dismiss the 3AC complaint in *Dimmick v. NCIRE*, C 04-4965
6 PJH. The court granted the motion to dismiss but also granted leave to amend one last
7 time. Additionally, at Dimmick's request, the court granted Dimmick leave to amend the
8 complaint in *Dimmick v. US*, C 05-0971 PJH. Order Dismissing TAC ("May 23, 2005
9 Order").

10 Dimmick then filed a fourth amended complaint ("4AC") in case number 04-4965
11 PJH and a first amended complaint ("1AC") in case number 05-0971 PJH in June 2005.
12 After the filing of the 4AC, BI and Abbott settled their claims with Dimmick and were
13 dropped from *Dimmick v. NCIRE*, C 04-4965 PJH.

14 In September 2005, this court granted NCIRE's motion to dismiss the claims against
15 it in 04-4965 PJH, and judgment was entered as to NCIRE on October 19, 2005. The
16 court, however, denied the Regents' motion to dismiss in 04-4965 PJH. Accordingly, the
17 only claims that remained in 04-4965 PJH after this court's September 2005 order were the
18 seventh and eighth claims for breach of contract and declaratory judgment against the
19 Regents. The Regents subsequently filed an answer to the 4AC in 04-4965 PJH on
20 October 19, 2005, and there have been no further motions in that case.

21 In the September 2005 order, the court also denied the government's motion to
22 dismiss the single negligence claim asserted under the FTCA in *Dimmick v. U.S.*, 05-0971.
23 The court, however, granted the government's motion for a more definite statement
24 ("MDS"), and stated as follows:

25 The 1AC is not a model of clarity and is at times internally inconsistent. The
26 cause of action for negligence is found at ¶ 51 (A)-(C). Dimmick alleges in
27 section (A) that the U.S. owed no fewer than a dozen duties to him under
28 federal and state laws and regulations, and under "their own standard of care
documents." However, no regulations are cited, no VA standard of care
documents are referenced, and the only law cited is California Health &

Safety Code § 24173 or 24178. It is not clear to the court whether Dimmick is claiming that each of the listed duties owed to him are derived from the cited provisions of California law, or from some other unidentified source. With regard to sections (B) and (C), no source is provided at all. The U.S. is correct that the complaint is vague and ambiguous. Frankly, it is impossible to determine whether Dimmick has stated a cause of action for negligence based on the breach of a duty whose origin has not been specified. While these three sections of ¶ 51, clearly set forth the conduct of the U.S. at issue, it is impossible for the defendant to frame a response to the pleading because it does not put them or the court on notice as to why the alleged conduct amounted to negligence.

The court concluded in the September 2005 order:

Because the court cannot find that Dimmick has or has not stated a claim for negligence against the U.S., the motion to dismiss is DENIED. However, the motion for a more definite statement is GRANTED. Because Dimmick's pleadings have been a moving target, with the theories and wrongdoers changing in every iteration, Dimmick shall not file a fifth amended complaint. Rather he shall file a document entitled simply, "More Definite Statement," in which he shall provide the origin of the duties he alleges were owed to him by the U.S. as set forth in ¶ 51 § (A) - (C). Dimmick may not take this opportunity to again change or enlarge upon his allegations. The statement must simply track and explain the allegations already set forth in the 1AC at ¶ 51. Even though the 1AC is Dimmick's third attempt at pursuing a proper action against the U.S., he is being afforded this opportunity because with a statement of the origin of the duties he alleged were breached, the U.S. should be able to frame a responsive pleading. The statement shall be filed within fifteen days of the date of this order. The U.S. shall thereafter answer the 1AC as amplified by the more definite statement, within twenty days of the filing of the statement.

DISCUSSION

A. Legal Standards

1. Rule 10(b)

FRCP 10(b) provides in pertinent part that:

Each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth.

"Separate counts will be required if necessary to enable the defendant to frame a responsive pleading or to enable the court and the other parties to understand the claims."

Bautista v. Los Angeles County, 216 F.3d 837, 840 (9th Cir. 2000) (quoting 2 Moore's Federal Practice § 10.03[2][a]). "Courts have required separate counts where multiple claims are asserted, where they arise out of separate transactions or occurrences, and

1 where separate statements will facilitate a clear presentation.” *Id.*

2 2. Rule 12(c)

3 The standard applied on a Rule 12(c) motion for judgment on the pleadings is the
4 same as that applied to 12(b)(6) motions: judgment on the pleadings is appropriate when,
5 even if all material facts in the pleading under attack are true, the moving party is entitled to
6 judgment as a matter of law. *See Hal Roach Studios, Inc. v. Richard Feiner & Co*, 896
7 F.2d 1542, 155 (9th Cir. 1989). As with motions to dismiss under Rule 12(b), a motion for
8 judgment on the pleadings ordinarily may not be based on matters outside the pleadings.
9 However, if extrinsic evidence is presented and the court is willing to consider it, then the
10 motion is “converted” to one for summary judgment. *See id.* at 1550.

11 B. Government’s Rule 10(b) Motion

12 Dimmick’s 1AC asserts a single negligence claim. The government argues that this
13 claim should be broken down into four separate claims pursuant to FRCP 10(b). According
14 to the government, these separate occurrences or transactions include:

- 15 (1) the VA doctors’ failure to obtain plaintiff’s informed consent prior to
16 prescribing him drugs;
- 17 (2) the VA doctors’ failure to obtain plaintiff’s informed consent prior to performing
18 human experiments on him;
- 19 (3) the government’s failure to establish and implement complaint procedures
20 without reprisal or retaliation; and
- 21 (4) the VA’s failure to “treat plaintiff with dignity, compassion and respect” and to
22 protect him from harm.

23 The government also argues that this court should dismiss Dimmick’s claims based on his
24 failure to set them out separately as required by Rule 10(b).

25 Dimmick responds that his claims arise from essentially the same occurrence. He
26 argues that “[w]hile there may be nuances that are distinct to each claim, the basic
27 elements are the same.” He concedes that the only claim that might be considered a
28

1 separate transaction would be the allegation that the defendant failed to investigate.

2 Dimmick further argues that if the court determines that there should be separate claims
3 pursuant to Rule 10(b), he should be given the opportunity to amend the complaint.

4 The court, however, concludes that pursuant to Rule 10(b), Dimmick has asserted
5 three – not four – claims. Those claims include:

- 6 (1) the government's alleged negligence in failing to obtain Dimmick's written
7 informed consent prior to (a) prescribing drugs, and/or (b) performing human
8 experiments on him;
- 9 (2) the government's alleged negligence in failing to establish complaint
10 procedures, communicate them to Dimmick and to conduct a meaningful
11 investigation [into] Dimmick's complaints without reprisal or retaliation against
12 him; and
- 13 (3) the government's alleged negligence in failing to treat Dimmick with dignity,
14 compassion, and respect, and to protect him from harm.

15 The court declines to break down the first claim into two separate claims, as
16 suggested by the government, because contrary to the other claims which do appear to
17 involve separate occurrences, this claim involves the same facts and the same underlying
18 transactions.

19 Dismissal, however, is not appropriate. *See, e.g., Bautista*, 216 F.3d at 841-42
20 (district court's "sudden death" dismissal of plaintiff's 2AC under Rule 10(b) for failure to
21 separate out claims was abuse of discretion even though "plaintiff's [2AC] frustrate[d] the
22 aim of the federal rule to bring about the just, speedy and inexpensive resolution of cases"
23 because complaint's "deficiencies were readily curable [under Rule 10(b)] with some
24 guidance from the court"); 2 Moore's Federal Practice § 10.03[4] (2005 ed.).

25 The court therefore considers the government's motion for judgment on the
26 pleadings in light of the above three claims. No further amendment of plaintiff's complaint
27 is required or permitted.
28

C. Government's Motion for Judgment on the Pleadings

1. Claim One (b) Must be Dismissed Because Dimmick was not a Human Experimentation Subject¹

Claim one (b), that the government was required to obtain Dimmick's informed because of his status as a human experimentation subject, must be dismissed for the reasons stated by this court in its prior September 26, 2005 order and those advanced by the government.

The court's prior order concluded that, as a matter of law, Dimmick would not have become a subject in a human research study until he was the recipient of the actual drug being investigated in the study.² Based on the doctrine of judicial estoppel, the court held that Dimmick was barred by statements in his pleadings from asserting that he was a subject in a human research study.

Because Dimmick was never a human experimentation subject as defined in the regulations, the government was not required to obtain his informed consent. The court's previous conclusion remains the law of the case. See *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988) ("[u]nder the 'law of the case' doctrine, a court is ordinarily

¹ The government does not move for judgment on the pleadings based on plaintiff's claim one (a) that the government failed to obtain written informed consent prior to prescribing medication. See Government's Motion at 9-10 (stating that it will instead move for summary judgment on the issue). In fact, neither party has addressed the specific issue of whether defendant's prescription of medication *in anticipation of potential participation in a human experimentation study* required Dimmick's informed consent.

²The federal regulations relied on by the court in its September 26, 2005 order, 21 C.F.R. §§ 312.3(b) and 56.102(e), provide that:

Subject means a human who participates in an investigation either as a recipient of the investigational new drug or as a control. A subject may be a healthy human or a patient with a disease.

21 C.F.R. § 312.3(b).

Human subject means an individual who is or becomes a participant in research, either as a recipient of the test article or as a control. A subject may be either a healthy individual or a patient.

21 C.F.R. § 56.102(e).

1 precluded from reexamining an issue previously decide by the . . . court"). Accordingly, the
2 court GRANTS the government's motion for judgment on the pleadings as to claim one (b).

3 2. Claims Two and Three Must be Dismissed Based on Governmental
4 Immunity

5 The Federal Tort Claims Act ("FTCA") waives sovereign immunity for specified torts
6 of federal employees acting within the scope of their employment "in the same manner and
7 to the same extent as a private individual under like circumstances" would be liable under
8 the law of the state "where the act of omission occurred." 28 U.S.C. §§ 1346(b), 2674.

9 The FTCA applies only if state law would impose liability on a private person. *United*
10 *States v. Olson*, 126 S.Ct. 510, 511-12 (2005) (reversing line of Ninth Circuit precedent
11 allowing "waiver simply on a finding that local law would make a *state or municipal entity*
12 liable," and instead holding that waiver exists only where *private person* would be liable).

13 In *Delta Savings Bank v. United States*, the Ninth Circuit rejected two of the plaintiff's
14 arguments that are pertinent to the case at hand. 265 F.3d 1017 (9th Cir. 2001). The court
15 rejected the plaintiff's argument that an "FTCA claim can be brought for violations of federal
16 statutes that provide private *federal* causes of action, even if there is no analogous state
17 law." *Id.* at 1024.

18 Additionally, the court rejected the plaintiff's argument that the state tort of
19 negligence per se satisfied the FTCA requirements regarding state law liability. The *Delta*
20 plaintiffs had argued "that if the forum state recognizes a claim for negligence per se for the
21 violation of a federal statute, then the local law requirement is satisfied." *Id.* at 1026. The
22 Ninth Circuit held that such reasoning "conflate[d] two elements of tort law: duty and the
23 standard of care." *Id.* It held that "any duty that the United States owed to the plaintiff must
24 be found in California state tort law," *id.* at 1025, and that California's "negligence per se
25 doctrine does not do away with the requirement in FTCA cases that the *duty* must be
26 created by state law." The "duty cannot spring from a federal law." *Id.* Instead, "[t]he duty
27 must arise from state statutory or decisional law, and must impose on the defendants a
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1 duty to refrain from committing the sort of wrong alleged here.” *Id.*

2 a. Claim Two

3 Plaintiff claims that the duty to investigate and to establish complaint procedures, as
4 set forth by the federal regulations and a VA patient’s “bill of rights,” is also incorporated
5 into California statutory law. This court has reviewed the regulations and statutory
6 provisions cited by plaintiff, and concludes that no such duties have been incorporated into
7 state law.

8 In asserting that the government owed a duty to investigate his complaints and to
9 establish a complaint procedure, plaintiff appears to rely on the following regulations: (1)
10 38 C.F.R. § 16.116, which governs the “general requirements for informed consent” as
11 pertains to the Department of Veterans Affairs, and which also appears to be the one that
12 plaintiff refers to as the “VA bill of rights;”³ 38 C.F.R. § 17.33(g), which sets forth
13 procedures for patients’ grievances with respect to the Department of Veterans Affairs; and
14 38 C.F.R. § 17.85 regarding the treatment of research-related injuries to human subjects
15 within the Department of Veterans Affairs.⁴ The other regulations cited by plaintiff

17 ³38 C.F.R. sections 16.116(a)(6)-(8) repeat verbatim plaintiff’s alleged duties regarding
18 complaint procedures. Those sections include requirements that a subject be advised re: “any
19 medical treatments . . . available if injury occurs. . . where further information may be
20 obtained,” and “whom to contact in the event of a research-related injury.”

21 ⁴38 C.F.R. § 17.33(g) provides that:

22 Each patient has the right to present grievances with respect to perceived
23 infringement of the rights described in this section or concerning any other
24 matter on behalf of himself, herself or others, to staff members at the facility in
25 which the patient is receiving care, other Department of Veterans Affairs officials,
26 government officials, members of Congress or any other person without fear of
27 reprisal.

28 Section 17.85 provides that:

VA medical facilities shall provide necessary medical treatment to a research
subject injured as a result of participation in a research project approved by a VA
Research and Development Committee and conducted under the supervision of
one or more VA employees.

1 regarding the Department of Veterans Affairs do not pertain specifically to these duties.
2 See 38 C.F.R. § 17.32 (informed consent); 17.34 (tentative eligibility).

3 However, to the extent that the cited federal regulations contain the duties
4 articulated by the plaintiff, neither the regulations nor the duties set forth within those
5 regulations have been adopted or incorporated into California law by *any of the California*
6 *code sections cited by Dimmick*. This includes California H&S Code §§ 24171, 24172,
7 24173, *et seq.* Accordingly, because a breach of duty created by federal law is not
8 actionable under the FTCA, and California law does not create a duty to investigate and to
9 establish complaint procedures, there is no basis for finding a waiver of sovereign
10 immunity. See *Delta*, 265 F.3d 1025-26. The court GRANTS the government's motion for
11 judgment on the pleadings as to this claim.

12 b. Claim Three

13 Plaintiff's MDS and opposition diverge regarding the source of the government's
14 alleged duty to treat Dimmick with dignity, compassion, and respect, and to protect him
15 from harm. His opposition states that the duty to treat plaintiff with respect and protect him
16 from harm is set forth in 45 C.F.R. § 46.116, which has been incorporated into California
17 H&S code § 24178(h). This is erroneous. No such duty is set forth by that federal
18 regulation.

19 However, plaintiff's MDS correctly sets forth the federal regulation pertaining to that
20 duty. 38 C.F.R. § 17.33(a), regarding patients' rights within the VA, is apparently the
21 source of plaintiff's right to be treated with respect, and provides that: "Patients have a right
22 to be treated with dignity in a humane environment that affords them both reasonable
23 protection from harm."

24 However, as with claim two, neither this federal regulation, 38 C.F.R. § 17.33(a) nor
25 the duties set forth in this regulation, have been adopted or incorporated into California law
26 by *any of the California code sections cited by Dimmick*, and thus, cannot provide the basis
27 for waiver of governmental immunity. See *Delta*, 265 F.3d 1025-26.

1 The court GRANTS the government's motion for judgment on the pleadings as to
2 claim three as well.

3 **CONCLUSION**

4 Pursuant to Rule 10(b), the court concludes that plaintiff's 1AC states three claims.
5 For the reasons set forth above, the court GRANTS the government's motion for judgment
6 on the pleadings as to claim one (b), and claims two and three.

7 Accordingly, the only remaining claim in 05-0971 PJH is claim one (a), which asserts
8 that the government was negligent in failing to obtain Dimmick's written informed consent
9 prior to prescribing drugs in anticipation of his potential participation in the studies.

10 **FURTHER INSTRUCTIONS RE: 04-4965 PJH**

11 Having reviewed the parties' January 17, 2006 letter briefs regarding remand of the
12 case to state court, and noting that the parties were unable to reach a joint proposal
13 regarding remand of this case, the court will permit the plaintiff to file another formal motion
14 for remand **no later than March 1, 2006**. The court additionally orders that any further
15 remand motion and respective opposition must address the only remaining basis for federal
16 court jurisdiction: discovery as to federal actors. The court will decide the motion **on the**
17 **papers.**

18 **IT IS SO ORDERED.**

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20 Dated: February 3, 2006



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PHYLLIS J. HAMILTON
23 United States District Judge
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